SUPREME COURT, U. S.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1561

CONTINENTAL/MOSS-GORDIN, et al.,
Petitioners,

v.

B-M-G INVESTMENT COMPANY, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, B-M-G Investment Company and Duncan Boeckman, Trustee, respectfully submit this Brief in opposition to Petitioners' Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATUTORY PROVISIONS INVOLVED

Rules of the Supreme Court of the United States, Rule 56(2) and (4) read as follows:

> "2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have

been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment."

"4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

REASONS WHY THE WRIT SHOULD BE DENIED

A less appropriate case in which to invoke the jurisdiction of this Court can hardly be imagined. The sole question presented is whether or not there is ambiguity in a particular provision of a contract between businessmen. Four judges of the federal judicial system have agreed that the provision is without ambiguity. Petitioners now seek to have the nine justices of this Honorable Court examine the contract in question and vote upon the question of its ambiguity. Thirteen justices in all.

Petitioners refer generally to conflicts between the decisions of the District Court and Court of Appeals, in this case, and other decisions in the federal judicial system. However, they do not direct the Court's attention to a single conflicting decision.

The truth is no conflict of decisions exists; the decisions within the federal system and, for that matter, among the state courts, are in harmony. The law is clear:

> If a contract is unambiguous its construction is for the Court, extrinsic evidence is neither relevant nor admissible, and the matter can appropriately be disposed of by summary judgment.

If, on the other hand, the contract is ambiguous, extrinsic evidence is proper to determine its meaning, a fact issue is raised by the ambiguity, and the case cannot be disposed of by summary judgment.

District of Columbia:

Simpson Bros., Inc. v. District of Columbia, 179 F. 2d 430 (Ct. App., D.C., 1949) *Cert. denied,* 338 U.S. 911, 94 L. Ed. 561, 70 S. Ct. 350;

Second Circuit:

Boro Hall Corporation v. General Motors Corporation, 164 F. 2d 770 (Second Circuit, 1947);

Third Circuit:

New Wrinkle, Inc. v. John L. Armitage & Co., 238 F. 2d 753 (Third Circuit, 1956);

Fifth Circuit:

Freeman v. Continental Gin Company, 381 F. 2d 459 (Fifth Circuit, 1967); *Green v. Valve Corporation of America,* 428 F. 2d 342 (Seventh Circuit, 1970)

Sixth Circuit:

Gesing v. Grand Rapids Hardware Company, 362 F. 2d 363 (6th Cir., 1966)

Seventh Circuit:

Brekken v. Readers Digest Special Products, Inc., 353 F. 2d 505 (Seventh Circuit, 1965)

Eighth Circuit:

Universal Fiberglass Corporation v. United States, 400 F. 2d 926 (Eighth Circuit, 1968); *Elbow Lake Coop. Grain Co. v. Commodity Credit Corp.*, 251 F. 2d 633 (Eighth Circuit, 1958)

Ninth Circuit:

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Tenth Circuit:

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Court of Claims:

Perry and Wallis, Inc. v. U. S., 427 F. 2d 722 (Court of Claims, 1970)

Accordingly, the propriety of summary judgment is entirely dependent on the existence or nonexistence of an ambiguity. This is the sole issue and it has been correctly decided by the United States District Judge and by the judges of the Court of Appeals.

The decisions of the courts below do not enunciate any new or startling principles of law. The memorandum opinions of the courts below are wholly without precedential value.

No constitutional questions are involved. The case involves no construction or interpretation of state or federal statutes.

The decision of the courts below do not conflict with any decision of another court of appeals or of this Honorable Court. The case meets none of the criteria of Rule 19, Rules of the Supreme Court of the United States, 28 U.S.C.A.

The case is wholly inappropriate for consideration by this Honorable Court.

At the time of filing this Brief Respondents have filed a Motion for Damages For Delay under the provisions of Rule 56(2) and (4) of the Rules of the Supreme Court of the United States, and Respondents respectfully request that this Brief be also considered as a brief in support of said motion.

This is a suit for acceleration of the maturity of indebtedness because of a default which occurred on April 29, 1968. For nearly three years Petitioners have withheld money that rightfully belongs to Respondents, and this during the period of tightest money and highest interest rates.

Petitioners have financed their protracted defense at the expense of Respondents, who have been deprived of interest at current rates on their money. Petitioners have avoided their obligation on the flimsiest of grounds. They have employed the federal judicial system as an instrument to gain delay. They have done this at the time that the federal judiciary is struggling to cope with the "ever-growing explosive increase in the amount of judicial business." Opinion of Chief Judge Brown in *N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F. 2d 966 (5th Circuit, 1970).

The Supreme Court has not been exempt from the "ever-growing explosive increase" in judicial business. The docket number of this case suggests that during this term of court 1,561 cases have been docketed in the Supreme Court — more than 173 appeals for each justice of the court.

Rule 56 provides the Court a tool to discourage litigants from overburdening the Court's crowded docket with frivolous appeals. In *Whitney v. Cook*, 99 U.S. 607, 25 L. Ed. 446, 9 Otto. 607 (1879) the Court said:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages * * * Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

The Supreme Court has, in a number of cases, adjudged damages as compensation where the appeal or application for certiorari were deemed frivolous. See, *e.g. Texas and Pacific Railway Company v. Prater*, 229 U.S. 177; 57 L. Ed. 1139; 33 S. Ct. 637 (1913) (10% of the judgment); *Wagner Electric Manufacturing Company v. Lyndon*, 262 U.S. 226; 67 L. Ed. 961; 43 S. Ct. 589 (1923) (an allowance of $1,500 on a $12,000 judgment); *Deming v. Carlisle Packing Company*, 226 U.S. 102; 57 L. Ed. 140; 33 S. Ct. 80 (1912) (5% of the amount of the judgment); *Sutton v. Bancroft*, 64 U.S. 320; 16 L. Ed. 454; 23 How. 320 (1860) (10% of the judgment); *Jenkins v. Banning*, 64 U.S. 445; 16 L. Ed. 580; 23 How. 455 (1860) (10% of the judgment).

Respondents' judgment is in the amount of $593,333, together with interest at the rate of 6% per annum on the principal sum of $680,000 from April 30, 1968 until April 11, 1969, and at the rate of 6% per annum on the principal sum of $593,333 from April 11, 1969 until paid.

There is now due and owing to Respondents the sum of $696,757.70, including principal, interest accrued thereon to April 1, 1971, and attorneys' fees allowed by the Court of Appeals.

For the protection of the Court's docket and to compensate Respondents for the delay resulting from Petitioners' frivolous appeal, damages in the amount of 10% of the judgment should be allowed.

CONCLUSION

The decision of the lower courts involved no constitutional issue, no interpretation of statute and does not conflict with decisions of other courts in the federal system. The case involves a private commercial dispute between businessmen; its determination was governed by local law of common and usual application. The decision of the issues involved has no precedential value whatsoever. Petitioners' Application for Writ of Certiorari is frivolous and is made solely for the purpose of delay. It is respectfully submitted that the Petition for Certiorari should be denied and Respondents should

be allowed damages for delay in the amount of 10% of the amount due in respect of its judgment.

Respectfully submitted,

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